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(19,750)

SUPREME COURT OF THE UNITED STATES.

No. 256.

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Clerk.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

PLAINTIFF IN ERROR,

vs.

THERESA J. WEHRMAN, EXECUTRIX OF WILLIAM F. WEHRMAN, DECEASED, AND OTHERS,

DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Ohio.

BRIEF FOR CERTAIN DEFENDANTS IN ERROR.

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This case comes up on a writ of error in the Supreme Court of the State of Ohio, seeking to correct alleged errors in the record of a judgment against The Merchants National Bank of Cincinnati, plaintiff in error.

STATEMENT.

The original action was brought by the filing of a petition (the initial pleading in the case under the Ohio Code) filed by William F. Wherman, then in life, against Frank B. McFarland, Myron A. Spencer, James McArdle, Jr., and a number of other defendants, among whom was the present plaintiff in error. (Record, p. 16.)

The petition states that certain of the defendants had entered into a contract of partnership on or about the thirteenth day of February, 1889, for the purpose of forming a syndicate and dealing in lands, and that the interests in said partnership were represented by certificates given to each holder of an interest of a certain share or number of shares. The contract under which these partners associated themselves is as follows: (Record, 34.)

AGREEMENT.

We, the undersigned, in consideration of the mutual agreements herein contained, severally agree, as follows:

First. That we will form a syndicate with a capital stock of $320,000.00, divided into 40 shares, of par value of $8000.00 each, and we will take the shares as subscribed by us.

Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000.00, payable $100,000.00 cash, and the balance ($200,000.00) on ten-year four

per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

Third. The balance of said capital stock, amounting to $20,000.00, shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

Fourth. The shares of said stock are to be paid for as follows: The sum of $300.00 per share immediately on signing this agreement; the sum of $2300.00 immediately after all shares are taken; the sum of $400.00 in sixty days after all shares are taken; the balance of $5000.00 on each share to be paid out of the proceeds of lots.

Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from the date hereof. Otherwise, said first payment of $300.00 on each share to be returned.

Cincinnati, Ohio, January 25, 1889.

Name.	No. Shares.	Amount.	Paid.
M. A. Spencer	3	$24,000 00	$900 00
John Woltz	5	40,000 00	1500 00
J. E. Brown	1	8,000 00	300 00
Rudolph Gohs	3	24,000 00	900 00
John Brokamp	3	24,000 00	900 00
James McArdle	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
Joseph Taylor & Co.	1	8,000 00	300 00
H. W. Meier	1	8,000 00	300 00
H. H. Lippelmann	1	8,000 00	300 00
H. D. Brown	1	8,000 00	300 00
Rebecca K. Brown	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
Gertrude Marcus, per M. Marcus, attorney	1	8,000 00	300 00
J. E. Fisher	2	16,000 00	600 00
F. B. McFarlan	1	8,000 00	300 00
Anna L. McFarlan, by F. B. McFarlan, attorney	1	8,000 00	300 00
Jno. M. Bolan	1	8,000 00	300 00
Peter J. Dunn	1	8,000 00	300 00
Woltz & Williamson	1	8,000 00	300 00
Phillas J. Woltz	2	16,000 00	600 00
Gertrude A. Spencer	1	8,000 00	300 00
Geo. M. A. Spencer	1	8,000 00	300 00
Wm. F. Wehrman	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
H. L. Taylor	1	8,000 00	300 00
Benjamin F. Wehrman	1	8,000 00	300 00
Brown & Woltz	1	8,000 00	300 00

The form of certificate given to the partners is Exhibit 6*a* (Rec., 35), and is as follows:

THE ELSMERE SYNDICATE.

Investment, $320,000. Paid up, $120,000.

No. ——. Non-assessable.

This is to certify that ——— ——— is the owner of a 1-40 interest in The Elsmere Syndicate. Transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

Witness our hands this ——— day of ———.

_____

_____

_____

Trustees.

Countersigned:

_____

Secretary and Treasurer.

For value received, ——— ——— sells to ——— ———, the interest above mentioned, and authorizes ———, attorney, to transfer the same on the books of the company.

In presence of:

_____

_____

The by-laws of the syndicate (Rec., 36) were in the following words:

BY-LAWS OF THE ELSMERE SYNDICATE.

THE OFFICERS.

The officers shall consist of a president, vice-president, secretary, treasurer and three trustees. The present trustees

shall remain in office during the life of the syndicate, unless impeached for wrong-doing, by a majority in interest of all the members; or if one or more should resign or die, then the place or places in any event, made vacant, to be filled by a majority in interest.

THE PRESIDENT.

The president shall preside at all meetings of the syndicate, and in his absence that duty shall devolve upon the vice-president.

THE SECRETARY.

The secretary shall keep a record of all the meetings of the syndicate and its trustees; keep the accounts of the syndicate and perform such other duties as the trustees may from time to time require of him. He shall receive a salary of $50 per month, payable monthly.

THE TREASURER.

The treasurer shall collect and receive all moneys of the syndicate, and pay out the same only on the order in writing of a majority of the trustees. He shall at all times keep his books open to the inspection of the trustees, and shall render to them an itemized statement of his receipts and expenditures at least once in each and every month, and oftener if required, and shall perform such other duties as may be required of him by the trustees. He shall give bond for the faithful discharge of his duties and proper accounting of moneys coming into his hands in the sum of $50,000, with security to be approved by the syndicate.

THE TRUSTEES.

The trustees shall have all the powers given them by and through a "Declaration of Trust," heretofore made and

signed; they shall sign all orders for the payment of money; make and execute all contracts of the syndicate in its behalf; hold all official bonds given by officers and others to the syndicate, and have general supervision over the affairs of the syndicate, with power to employ counsel at a reasonable fee, and contract with agents for the sale of the syndicate property. They shall receive a salary of $500.00 each, the year commencing May 1, 1889, unless the sales of property of the syndicate during said year (beginning May 1, 1889, and ending May, 1890,) shall exceed $400,000..00, in which event their salary shall be $1000.00 each instead of $500.00. Their salary for subsequent years shall be fixed at each annual meeting of the syndicate.

MEETINGS OF THE MEMBERS.

Annual meetings of the syndicate shall be held on the first Monday in April in each year, and such other meetings shall be held from time to time as in the opinion of the trustees are necessary, or meetings may be called at any time on the request of shareholders representing at least one-third of the shares. The president, vice-president, secretary and treasurer, shall be elected at the annual meetings, and such other business may be disposed of at any and all meetings as may be presented. At all meetings each shareholder shall be entitled to one vote for each share of stock held by him and a majority in interest so voting shall govern.

The petition then goes on to state that the said syndicate was organized for the purpose of taking a leasehold interest in a large quantity of land contiguous to the city of Cincinnati, owned by Joseph and G. W. B. Cleneay, which said lease required the payment of all taxes and assessments and of certain ground rent payable quarterly, and that the said

leasehold interest was vested in trustees for the use of the members of said syndicate, and for the purpose of making sales and deeds, and said lease contained a clause that the owner should join in a plat of said property, that individual lots might be sold and conveyed upon the payment to the Cleneays of a certain amount for each lot, and that thereafter a plat was accordingly made subdividing said property into lots and laying out streets. That thereafter the said partnership commenced to do business and sell lots, and did sell a large number of lots, and gave deeds for the same when they were purchased on deferred payments, and continued this business up to about the fifteenth day of June, 1896, when, under foreclosure proceedings for back rents and unpaid taxes that had accrued, the said Cleneays sold the interest of said syndicate in said leasehold at judicial sale in the Circuit Court of the United States for the Southern District of Ohio, Western Division, and that the said Cleneays purchased in said leasehold interest, and that thereafter the said syndicate or partnership had no further interest therein.

It is further alleged that for about three years prior to the sale as aforesaid, the trustees of said syndicate had not been able to make any considerable number of sales of lots, whereas the expenses of maintaining the same were large, and the said syndicate members, as a syndicate, became largely involved in debt, and a large number of members of the syndicate were giving the matter no attention, and declined to aid in any manner with funds, and as a consequence said syndicate became insolvent and lost substantialy all of its assets; but that certain other members of the syndicate, being anxious to maintain the same until the times should improve, and thinking they would thereby subserve the interests of all concerned and prevent the loss of the leasehold property

and would enable them thereafter to make sales and resume business, and with the full knowledge and consent of all the members of said syndicate, and at the express desire and request of the trustees thereof, to wit, M. A. Spencer, Frank B. McFarlan and James McArdle, Jr., and an advisory committee of which the vice-president of the said Merchants National Bank was one, raised moneys for the use and benefit of said syndicate by borrowing money; and that the said loans were necessary to save said shareholders from loss.

The petition then sets out the names of the owners of shares at the time of the filing of the petition, of which shares the Merchants National Bank is alleged to own nine; that the said syndicate had ceased to do business and had become insolvent and had lost substantially all of its property and was not able to further prosecute its business and ought to be dissolved and a receiver appointed and an account taken.

Thereupon the plaintiff prayed the court to dissolve and wind up the said syndicate, to state an account of the said partnership affairs and to find the amount of its debts, to appoint a receiver of the assets thereof, and generally to direct the payment of its debts.

The answer of the Merchants National Bank (Rec., 19) was substantially a denial of the allegations of this petition and does not allege any particular ground of want of power on the part of the bank, but does deny as a fact that it formed any syndicate or partnership with the plaintiff, or became a member of any syndicate known as the Elsmere Syndicate.

The lease of the Cleneays and the deeds vesting title in the trustees of the syndicate are Exhibits 1, 2 and 3, at pages 27, 30 and 31 of the Record. The case was tried in the Court

of Common Pleas of Hamilton county, in said state, and for the purpose of stating the account was referred to a master, whose report is found on page 20 of the printed Record.

The character of the claims is shown by that report, and the names of the shareholders and the number of shares held by each are also set forth. Upon the coming in of that master's report, a judgment was rendered against the various defendants, including the Merchants National Bank, and the case was thereupon appealed and tried in the Circuit Court, the court of errors and appeals inferior to the Supreme Court, and the judgment of that court is found in the transcript, commencing on page 37 of the Record, and in it, on page 38 of the Record, the following findings of fact are made with reference to the interest of the Merchants National Bank, plaintiff in error:

> "That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, but transferred to it as owner when they were transferred to said Brown; that when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States government, and the bank, through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge and acquiescence of the board of directors of said bank."

The Federal Question.

Whatever federal question there is in the case arises from the fact that the plaintiff in error is a national bank organized under the acts of congress, and in connection with the fact that it challenged its right under those acts to enter into a partnership. Any federal question that would arise merely from the status of the plaintiff in error, or in other words, the mere fact that it was a national bank, is removed from the case by

25 U. S. Statutes at Large, 433.

The answer filed in the Court of Common Pleas (Rec. 19) does not in any way expressly deny its power to become a member of the Elsmere Syndicate or partnership, but simply denies the fact.

The motion for a new trial (Rec. 45), as the fourth ground of said motion, says:

> "Because the said The Merchants National Bank is a corporation organized under the banking laws of the United States, and the decision rendered herein is to the effect that such a corporation has power to be or become the member of a partnership."

The case was twice in the Supreme Court of the state; first, on a petition in error filed September 2, 1902, and the errors complained of were:

First. That the court erred in finding that the plaintiff in error was the owner of nine shares in the so-called Elsmere Syndicate.

Second. The court erred in finding that said shares had been transferred to the plaintiff in error as the owner thereof, and not merely as the pledgee thereof.

Third. The court erred in finding that the plaintiff in error was a partner in the partnership known as the Elsmere Syndicate.

Fourth. The court erred in its construction of the banking laws of the United States, and in its holding that the plaintiff in error, a corporation organized under the banking laws of the United States, had power, under such laws, to be and become a member of a partnership dealing in real estate.

Fifth. The court erred in its construction of the said banking laws of the United States in holding that under such laws the board of directors of the plaintiff in error had power, without the assent of the stockholders of the plaintiff in error, to cause the plaintiff in error to be or become a member of a partnership dealing in real estate.

Sixth. The court erred in finding that the board of directors of the plaintiff in error knew of or assented to the plaintiff in error becoming a member of a partnership dealing in real estate.

Seventh. The court erred in overruling the exceptions of the plaintiff in error to the master's report filed in said court.

Eighth. The court erred in overruling the motion of the plaintiff in error for a new trial.

Ninth. The court erred in decreeing and finding that the plaintiff in error should pay the said sum of $17,002.82.

Tenth. The court erred in not dismissing the plaintiff in error from the said case.

The only errors complained of that relate to the powers of the plaintiff in error are the fourth and fifth, and they both relate to alleged error committed by the court below in holding that the plaintiff in error could become a member of a partnership dealing in real estate.

The case was reversed on this first petition in error. See, Merchants Nat. Bank vs. Wehrman, 69 O. S., 160.

The court expressly upholding the contention of the plaintiff in error that it could not become a member of a partnership, thus upholding the claim of immunity or right set up in the pleadings of and contended for by the bank, but did proceed to hold that

> "The bank having become the owner of these nine shares, and not having the power to become a partner, it became in legal effect, a part owner of the property of the syldicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property. The bank is thus liable for nine-fortieth parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness."

This was grounded upon the finding of the Circuit Court upon the question of the ownership and manner of acquisition of those shares by the bank as contained in the findings of the Circuit Court.

The case was then remanded to the Circuit Court of Hamilton county and re-tried upon the question of the amount of indebtedness of the Syndicate, and the Bank's proportion thereof, and a second decree was entered (Rec. 57), which modified the former decree of the Circuit Court in

the respects commanded by the Supreme Court, but provided (Rec. 62), "In all other respects said original decree shall stand as originaliy entered with only the modification herein provided for."

And in the second motion for a new trial (Rec. 63) this ground is stated:

> "Fourth. The defendant, The Merchants National Bank, is a corporation organized under the banking laws of the United States, and as such corporation could not, under the provisions of said laws, be held liable for any proportion of the debts and liabilities of the partnership known as The Elsmere Syndicate."

In the petition in error filed to reverse that judgment, the first, second, third and fourth errors complained of relate to the alleged error of a misconstruction of the banking laws of the United States, the effect of which errors is summed up in the fifth alleged ground as having culminated in an error in finding and decreeing that the plaintiff in error was liable for any part of the debts and liabilities of the Elsmere Syndicate prior to the fifteenth day of January, 1892. The first three items seem, however, to relate to the contention that had been carried through the earlier phases of the case that the Bank could not become a member of a partnership. In this matter, by reason of the section of the Revised Statutes already cited, all special immunity arising out of the fact that the plaintiff in error is a national bank is removed, and it is assimilated to the status of an ordinary corporation, and therefore all that it can complain of as involving a federal question could only arise out of a misconstruction of the Acts of Congress (Sections 5136, 5137), whereby it was deprived of some immunity or right accorded to it by those sections.

The sections of the Revised Statutes, which it is claimed the Supreme Court of the State of Ohio misapplied and misconstrued and out of which the federal questions involved in this case arise, are 5136 and 5137; but the only questions that were made by the pleadings and in the trials in the courts below were whether or not the Merchants National Bank, by the ownership of certain shares in the Syndicate, could become a partner therein and liable for its debts, which, on page 172 of the 69th O. S., is defined to be a liability, not only for its own share of the debts of the firm, but also the debts of its co-partners.

At no time was it suggested that there was any distinction between the debts until after the case had been tried in the Circuit Court of Hamilton county for the second time in carrying out the judgment of the Supreme Court. It was then claimed in the second petition in error in the fifth assignment of error (Rec. 65) that the plaintiff in error was not liable for any debts and liabilities of the Syndicate that accrued prior to the fifteenth day of January, 1892, but there is no evidence other than may be inferred from the master's report, the other evidence being absent from the record, that any indebtedness arose before that date, and nothing whatever in any of the judgments contained in the record that would show that that date cut any figure in the case whatever, or that any prior indebtedness was allowed, or was made to appear otherwise than by mere argument, but as the whole contention had been that the Merchants National Bank could not be a partner, therefore it could not be liable for any of the debts. The contention that it was not liable for the debts prior to January 15, 1892, is a severance of its liabilities and an abandonment of its position that

the whole thing depended upon whether or not the bank could be a partner, and a tacit admission that it might be liable after that date, whereas if the sections of the Revised Statutes excused it, it must have been excused *in toto*.

It is not a federal question unless some privilege or immunity or right secured to it by that or other sections of the Revised Statutes is denied it. The mere ordinary making of contracts and conducting the business of the bank and the obligations that ensue either from contract or from tort are not a federal question. Nobody denies that a corporation, whether under the Revised Acts of the United States, or other acts of the state legislature cannot perform acts *ultra vires*, but the Section (5136) expressly permits the making of contracts, and the exercise of all powers appertaining to such companies that are usual and incidental to the carrying on of the business for which they are chartered and the application of the rules of common law and equity to its acts follow as a matter of course. The application of these rules does not raise a federal question.

See,

Inez Mining Co. vs. Kinney, 46 Fed., 832.

The reasoning in

Texas & Pacific Railroad Co. vs. Cody, 166 U. S., 606, and
Tex. & Pac. R. R. Co. vs. Barrett, 166 U. S., 617,

does not apply in this case because of the deprivation of the right to litigate in the United States Court from the mere fact that the party is a national bank. In

Allen vs. Arguimbau, 198 U. S., 149,

it was held that

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the

other not, and it does not appear on which of the two the judgment was based and the ground independent of a federal question, is sufficient in itself to sustain it, this court will not take jurisdiction.

"The certificate of the chief justice of the Supreme Court of the state on the allowance of the writ of error that the judgment denied a title, right or immunity specially set up under the statutes of the United States, cannot in itself confer jurisdiction on this court.

"Plaintiff in error contended as defendant in the state court, which overruled the plea, that his notes were void because given in pursuance of a contract which involved the violation of Sections 3390, 3393, 3397, Rev. Stat., providing for the collection of revenue on manufactured tobacco. Held, that as an individual can derive no personal right under those sections to enforce repudiation of his notes, even though they might be illegal and void as against public policy, the defense did not amount to the setting up by, and decision against, the maker of the notes of a right, privilege or immunity under a statute of the United States, within the meaning of Section 709, Rev. Stat., and the writ of error was dismissed."

And in

Leonard vs. V. S. & P. R. R. Co., 193 U. S., 416,

the syllabus reads:

"The rule reiterated that persons may by their acts or omissions to act, waive rights which they might otherwise have under the constitution and laws of the United States; and the question whether they have or have not lost such rights by their failure to act, or by their action, is not a federal question."

"The judgment in this case rested on grounds broad enough to sustain it independent of any federal question."

And in

Pierce vs. Somerset Ry., 171 U. S., 641-648,

this court said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question of whether he has or has not lost such right by his failure to act or by his action, is not a federal one."

And,

Eustis vs. Boles, 150, U. S., 361;
Seneca Nation vs. Christy, 162 U. S., 283;
Gillins vs. Stinchfield, 159 U. S., 658;
Speed vs. McCarthy, 181 U. S., 269,

are all examples of waiver or estoppel in such cases or a bar of the state statute, and in fact, the rules of common law and equity, or the rule established by local custom or statute equally fail to give rise to any such question provided the validity of the statute, or construction of the statute itself is not in question. In

Pa. R. R. Co. vs. Hughes, 191 U. S., 477,

it was held:

> "That the jurisdiction of this court to review a judgment of a state court under Section 709, U. S. Revised Statutes, depends upon the assertion of a right, privilege or immunity under the federal constitution or laws set up and denied in the state courts.
>
> "Held that the highest court of a state may administer the common law according to its own understanding and interpretation thereof, being only amenable to review in this court where some immunity or privilege created by the federal power has been asserted and denied.
>
> "Held that while congress under its power may provide for contracts for interstate commerce permitting the carrier to limit its liability to a stipulated valuation,

it does not appear that congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a state may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding.

"There is no difference in the application of a principle based on the manner in which a state requires a degree of care and responsibility whether enacted into a statute or resulting from the rules of law enforced in its courts."

Although it is the usual rule in matters that relate to interstate commerce that where congress has been silent on the subject, that means that commerce is to be untrammeled by state regulations.

In

C. I. & L. R. R. Co. vs. McGuire, 196 U. S., 128,

it is held that if the Supreme Court fails to consider the question because it has not been properly made in the court below, then this court will not review its judgment, unless it appears that the validity of the statute was necessarily involved. And in

Supply Co. vs. Light & Power Co., 197 U. S., 299,

where it was claimed that service upon an agent of a corporation was not sufficient service, which was upheld by the lower court in South Carolina, but afterwards reversed by the Supreme Court, and thereupon it was claimed that the agent was not such an agent as to bring the corporation, which was a foreign corporation, into court, and was not due process of law, but the Supreme Court declined to consider the question presumably because it had not been made prior to its first decision, that this court would not review it because, even though it were a federal question, the State

Supreme Court might very well decline to consider it when not made in time. In

Harding vs. Illinois, 196 U. S., 78,

it is said that this court will not reverse the judgment of a state court holding an alleged federal constitutional objection waived, where the record discloses that no authority was cited or argument advanced in its support and it is clear that the decision was based upon other than federal grounds and the constitutional question was not decided. On page 86 the court quoted from Capital City Dairy Co. vs. Ohio, 183 U. S., 238, as follows:

> "It is well settled that this court, on error to a state court, can not consider an alleged federal question, when it appears that the federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause."

And this, although the state court certified as to the existence of the federal questions which had been called to its attention and which it had decided, no reference being made, however, in the certificate, to the claim of federal right that they were then considering. In this case the vague objections taken may be applied to the objections taken in the case at bar. In

Shoshone Mining Co. vs. Rutter, 177 U. S., 505,

it was held that an adverse suit authorized by the statutes of congress in the case of mining property is not sufficient necessarily to vest jurisdiction in the federal courts; and in

Telluride Power Co. vs. Rio Grande & Western R. R., 176 U. S., 139,

it is said that the jurisdiction of this court in cases brought up by writ of error to a state court, does not extend to

questions of fact or of local law, which are merely preliminary to, or the possible basis of, a federal question.

And in

> Cook County vs. Calumet & Chicago Canal Co., 138 U. S., 635-53,

this court says:

> "The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

Privileges and immunities are more properly applied to general attributes that may be said to attach on account of the status of the party. It is a privilege of a national bank to be a corporation and to transact banking business. It is an immunity to be free from taxation except at the same rate as other moneyed capital in the state where the bank is located, but it is neither a privilege nor an immunity to be free from the obligations of a contract or the consequence of a tort. So far from that, the sections of the acts of congress cited expressly permit banks to make contracts and do all other acts usually incident to the carrying on of that particular business.

Nobody has ever disputed in this case that the bank in common with other corporations is not bound, in a legal sense, by contracts beyond the scope of its charter powers—in other words, ultra vires. But when a contract is legal, the results that follow are those that usually follow such contracts in other cases, and the validity of the contract and its obligation depend upon the ordinary principles of the statutory or common law of the state. For instance, whether a contract is valid under the Statute of Frauds is not a

federal question, nor is the question whether the bank is estopped a federal question.

In this case, the papers executed by the parties made out a parnership.

Clagget vs. Kilbourne, 1 Black U. S., 346;
Yeoman vs. Leslie, 46 O. S., 190;
Hulitt vs. Fairbanks, 40 O. S., 233;
McFadden vs. Leeka, 48 O. S., 513;
Chester vs. Dickinson, 54 N. Y., 1;
Batty vs. Adams Co., 16 Neb., 44;
Robins vs. Butler, 24 Ill., 387;
Heirs of Ludlow vs. Cooper's Devisees, 4 O. S., 1.

Of these, the cases in 24 Illinois and 1st Black are almost identical in their circumstances with the case at bar. There was a trust in lands to be managed and marketed as a commercial transaction for the benefit of others, and they held that there was a partnership and that the persons were liable for the obligations incurred.

A partnership may exist with transferrable shares.

Wadsworth vs. Dunn, 164 Ill., 360;
Wells vs. Wilson, 3 Ohio, 425;
Rianhard vs. Hovey, 13 Ohio, 300;
Jones vs. Clark, 42 Cal., 180;
Lingley on Partnership, 363, Sec. 5 on Transfer of Shares.

In such cases, where it was a part of the original agreement that the interest of the partners should be evidenced by certificates of ownership analogous to a certificate of stock which might pass from hand to hand and be transferred on the books of the company to the transferee who for all purposes takes the place of the original subscriber, it can hardly be questioned that the result contemplated and contracted for follows, and that there is not a dissolution

such as arises where one partner, without the consent or knowledge of, and without any previous arrangement with, his partners, sells his interest or becomes bankrupt. The latter result has been put upon the ground that an ordinary contract of partnership is a single contract between definite persons and that as against the will of some, one can not, in a relationship of personal confidence, substitute some third person for himself and therefore, necessarily, a dissolution occurs, but where, as in the case at bar, all parties agree that the interest of one might be transferred on the books of the company by transferring his certificate of ownership and that they will receive the transferee as one of their number, there is no reason and no necessity for dissolution. This is easier to reconcile with the principles of law in our case, because the management had been committed to, and the confidence had been reposed in the trustees. The persons thus had nothing to do with the active management of the affairs of the syndicate other than as equitable owners and subject to the deeds and declaration of trust and by-laws, they might, by a majority counsel, but not direct, and therefore that delectus personae, that is the privilege of choice of each member of an ordinary partnership was of no importance here.

In such a partnership, the indebtedness of the partnership follows the interest transferred like a transfer of a share of the stock as is said in

Brown vs. Hitchcock, 36 O. S., 667;
Lindley on Companies (6th Ed.), 665;
Mayhew's case, 5 DeG. McN. & G., 848;
Wells vs. Wilson, 3 O., 425.

In the case of

Rianhard vs. Hovey, 13 O., 300,

the result did not follow because the obligations were not within the scope of the partnership business and therefore were held to bind those only who were cognizant of the proceedings and by silence or positive act assented thereto.

The Circuit Court found in that part of the judgment already quoted that the Merchants National Bank had held the nine shares in the name of W. W. Brown, first as collateral, and then became the owner thereof. In

First Nat. Bank vs. Nat. Exchange Co., 92 U. S., 122,

it is held that a bank in working out its security may do, in that behalf, whatever other persons may do under like circumstances. It is not necessary for us in this case to resort to the decision of National Bank vs. Case, 99 U. S., 629, nor to go that far. In that case it was held that where a national bank became the owner of stock in another bank in the process of saving its debt, it thereby had the status of a stockholder impressed upon it with all the usual results. In this case it was at first claimed that the bank, having become the owner legally of these shares, assumed thereby the status of a partner with all its attendant results, including the liability for all the debts of the enterprise. But this point was decided in favor of the bank by the Supreme Court of Ohio. The pertinency of the claim consisted in the fact that they were only holders of twenty-three shares, who were solvent, instead of forty at the final outcome, and the bank was, by the court below, held liable for nine twenty-thirds (9-23) instead of nine-fortieths (9-40).

The Supreme Court of Ohio proceeded upon the theory as its opinion discloses, that the bank, having become legally

the owner of this nine-fortieths interest, and having, as the Circuit Court found, taken part in the management of the syndicate through its vice-president, and in the effort to preserve its property from sacrifice and loss, and that all of this was done with the knowledge and acquiescence of the board of directors of the bank, it was liable for its share as the owner of nine-fortieths of the amount for the same proportion of those debts which had been incurred in that effort to save the property. The debts were for ground rents, taxes, etc., etc., and during all the time that this was going on the bank sat by and received the moneys paid in on title bonds and agreed, according to the finding, that these moneys should be applied to the purpose specified in the decree of the Circuit Court. These certificates obligated the holders to pay $8000.00. Only $3000.00 was ever paid on them, so that when the bank became the owner of them, there was that obligation to pay a large additional amount, much more on its nine shares than was ever charged to the bank on the wind up, and while it is true that as between the certificate holders that was to be one of the proceeds of the property, yet that became impossible, and in any event never bound the creditors.

There never was any suggestion prior to the filing of the second petition in error in the Supreme Court of Ohio that any distinction was to be drawn between the character of the debts incurred by the Syndicate, and the whole defense originally was based upon the theory that by reason of the acts of congress, the bank was not liable for any of the indebtedness. It never admitted that it was a part owner of shares and was liable for a part, and not liable for the other part of the debts, but its whole attitude was an entire denial

of the partnership relation and a consequent total exemption from liability, and it is utterly inconsistent to change that to a confession and avoidance—by confessing the ownership of the shares and seeking a separation of the debts and classifying them and claiming exemption from a portion. In

Cyclopedia of Law and Procedure, Vol. 2, 670,

it is said:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the Appellante Court is that a party cannot, when a case is brought up for appellate review assume an attitude inconsistent with that taken by him at the trial, but that such party is restricted to the theory on which the cause was prosecuted for defendant in the court below."
>
> Railway Co. vs. McCarthy, U. S., 258. (6 Otto, 258.)

This in itself was sufficient to induce the Supreme Court of Ohio to ignore the change of front at that period.

Bullock vs. Kilgour, 49 O. S., 43;
B. & O. Ry. Co. vs. Smith, 54 O. S., 562.

Nobody in the case ever argued that the mere ownership in common of land would attach obligations to such owner for debts incurred, but if there were taxes to pay, or ground rent to pay, or other obligations which threatened the title, and one part owner suggested the borrowing of money to clear off that obligation, and the bank, through its proper representative had assented thereto, nobody could argue that the bank was not liable for its share, not as a partner, but as an owner of an aliquot share of the common property, and that situation was exactly the situation in this case. The bank knew and assented to everything that took place, as found by the Circuit Court in its judgment,

and the Supreme Court decision goes upon the ground that the bank, having a legal right to own these shares had the legal right to protect them, and that is not a federal question because it has been too frequently settled by the Supreme Court, and further that the bank expressly or impliedly authorized every debt that was incurred, and that is not a federal question because it is only the natural result and obligation of a valid contract entered into by the bank within the scope of its powers.

In the second trial after it was remanded by the Supreme Court of Ohio, there was nothing to do but to follow out the decision of the court, and on the second petition in error, the only thing to be considered by the court was whether that had been done or not. In other words, none of the questions which were before the court on the first writ of error can be re-heard or re-examined upon a second.

Johnson vs. Von Kettler, 84 Ill., 315;
Smith et al. vs. Schaffer, 50 Md., 132;
Hernon vs. North Carolina Railroad Co., 127 N. C., 110;
Clark vs. Keith, 106 U. S., 465;
Chaffin vs. Taylor, 116 U. S., 572;
Jameson vs. Maxwell Land Co., 168 U. S., 456;
Bent vs. Miranda, 168 U. S., 471.

The question of whether the bank was liable for any part of the debts was an open question on the first petition in error, but if no attempt was made to classify the debts and differentiate the grounds of liability, until after the original judgment of the state court was pronounced, that fact alone was sufficient, even though the Supreme Court might have been wrong to authorize it to decline to reconsider questions

that might have been made prior to the first decision of all open questions were foreclosed by that decision and if not then open it never became so because no change was ever made in the pleadings.

C. B. MATTHEWS,
Attorney for Defendant in Error.

FILE COPY.

No. 256.

Supreme Court of the United States

OCTOBER TERM, 1906.

THE MERCHANTS NATIONAL BANK OF [illegible],

Plaintiff in Error,

vs.

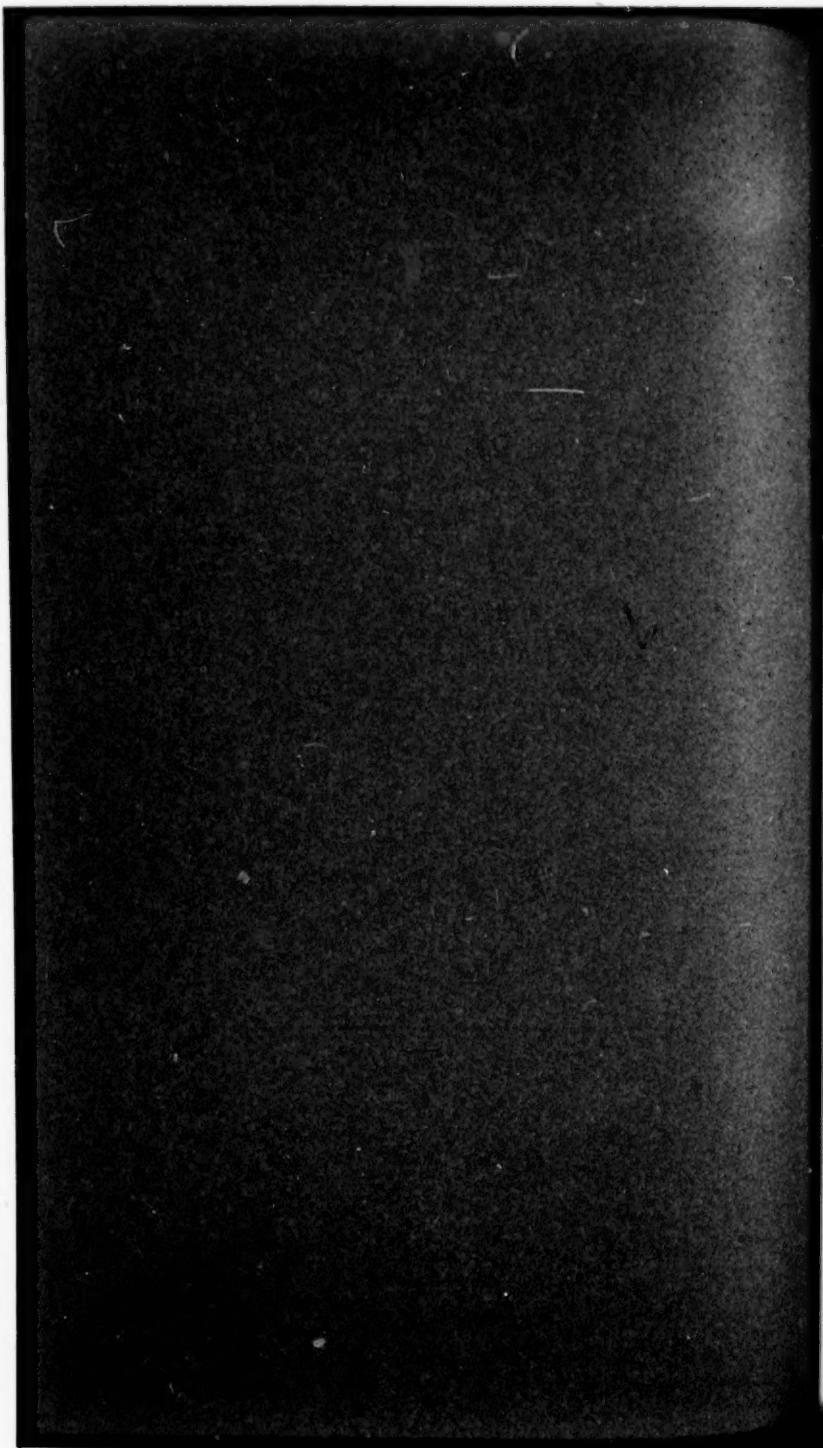
THERESA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al.,

Defendants in Error.

ON ERROR TO THE SUPREME COURT OF [illegible].

Brief for Theresa J. Wehrmann, Executrix.

[illegible]



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

Plaintiff in Error,

No. 256. *vs.*

THERSEA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al.

Defendants in Error.

ON ERROR TO THE SUPREME COURT OF OHIO.

Brief for Theresa J. Wehrmann, Executrix.

STATEMENT.

This cause was originally commenced in July, 1897, by William F. Wehrmann, in his life time, in the Court of Common Pleas of Hamilton County, and at his death, his executrix, Theresa J. Wehrmann, one of the defendants, was duly substituted party plaintiff.

The action was brought to wind up the affairs of the Elsmere Syndicate, to provide for the payment of its debts and a complete settlement between the members of the syndicate and its crediters.

The plaintiff in error here was duly made a party thereto and after going through the common pleas and circuit courts it finally reached the Supreme Court of Ohio on the petition of the Merchants National Bank and the judgment of the circuit court was modified and remanded to the circuit court as will appear below:

"69 Ohio State Reports, page 160.

"*The Merchants National Bank* v. *Wehrmann.*

"(No. 8133. Decided October 27, 1903.)

"Error to the Circuit Court of Hamilton County.

"The litigation in this case had its origin in an agreement signed by some twenty-five persons, of which the following is a copy, omitting signatures:

" 'We, the undersigned, in consideration of the mutual agreements herein contained severally agree, as follows:

" 'First. That we will form a syndicate with a capital stock of $320,000, divided into forty shares, of the par value of $8,000 each, and we will take the shares as subscribed by us.

" 'Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000, payable $100,000 cash and the balance ($200,000) on ten-year four per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

" 'Third. The balance of said capital stock, amounting to $20,000, shall be used for the improvement of said land, and for the expenses incident to the management, control and sale thereof.

"'Fourth. The shares of said stock are to be paid for as follows: The sum of $300 per share immediately on signing this agreement; the sum of $2,300 immediately after all shares are taken; the sum of $400 in sixty days after all shares are taken; the balance of $5,000 on each share to be paid out of the proceeds of lots.

"'Fifth. After the cost of land, including the cost of making streets advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits and shall be divided among the shareholders equally, share and share alike.

"'Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from date hereof. Otherwise, said first payment of $300 on each share to be returned.

"'Cincinnati, Ohio, January 25, 1889.'

"The full number of forty shares was subscribed and certificates of shares in the following form were issued to the subscribers respectively:

"'The Elsmere Syndicate,

"'Investment, $320,000. Paid up $120,000.

"'No. ————. Non-assessable.

"'This is to certify that ———— is the owner of 1-40 interest in the Elsmere Syndicate, transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

"'Witness our hands that ——— day of ————.

"'.....,

"'.....,

"'.....,

"'*Trustees.*

"Countersigned,

"'.....,

"'*Secretary and Treasurer.*

"'For value received, ——— sells to ——— the interest above mentioned, and authorizes ———, attorney, to transfer the same on the books of the company.

"'In presence of

"'.....,

"'.....'

"One F. B. McFarlan subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness, about the month of January, 1892, which transfer was made to 'W. W. Brown, trustee,' said Brown being cashier of said bank. The bank contends that the transfer to Mr. Brown was as collateral security for the debt; while others claim that the transfer made the bank the owner of the shares.

"The syndicate was organized, by-laws adopted, officers elected, and the powers of the trustees defined, which included the platting of said property, the leasing and selling thereof, to pay the purchase money and ground rents, and to pay the balance of the funds to the holders of said certificates in proportion to the number of shares held by each.

"The syndicate became insolvent in the year 1896 and the persons from whom the land had been obtained foreclosed and purchased the land, and thereby the syndicate was prevented from further carrying on its business.

"After this transfer of the nine shares to Mr. Brown, trustee, the syndicate became largely in-

debted for improvements, ground rent, interest and other items intended for the betterment of the property, and its conversion into money.

"About July, 1897, an action was commenced by William F. Wehrmann against the parties interested in said syndicate, including W. W. Brown, trustee, and the said bank, seeking to hold the owners of said certificate as partners and for an accounting. Issues were made up in which said Brown and said bank denied that they were at any time partners in said syndicate and averring that said nine shares were held as collateral only.

"The case was referred to a master, and he made his report and the case was taken to the circuit court on appeal and there tried upon the report of said master in the common pleas, and exceptions thereto and a finding of facts and conclusions of law separately were made by the circuit court.

"The facts found, going to show the liability of said bank are as follows:

" 'First. That what has been called herein the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase of certain lands situated near Norwood, this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quit-claimed his title to Myron A. Spencer, Frank B. McFarlan and James McArdle, as trustees for said syndicate, on or about the 16th day of February, 1889. And that the business of the said syndicate was to subdivide said lands into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.

" 'Second. That the interest of the parties in

said partnership are represented by certificates of equal interest or shares, forty in number, numbered consecutvely from one to forty and transferable from hand to hand on the books of the said company.

" 'That the partnership became insolvent, and it became impossible to carry on further the said business and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of same and that it became necessary to file the petition in the court below to wind up the affairs and business of the said partnership, to realize the assets, if any, and to compel the partners to liquidate the indebtedness thereof.

" 'Fourth. That on June 15, 1896, the interests in said partnership were held by the following named persons in the proportion set opposite their names, to-wit:

" 'Myron A. Spencer, two shares.

" 'Wm. F. Wehrmann, estate, Theresa J. Wehrmann, executrix, five shares.

" 'Merchants National Bank of Cincinnati, Ohio, nine shares.

" 'James Armstrong's estate, James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors, three shares.

" 'Moses Krohn, one share.

" 'Leopold Feiss, one share.

" 'Benjamin Pritz, one share.

" 'Peter G. Thompson, one share.

" 'Joseph Taylor, one share.

" 'Richard Hempel, three shares.

" 'William Bell, eight shares.

" 'W. B. Kennedy, two shares.

" 'J. Fred Woltz, one share.

" 'James McArdle's estate, Margaret McArdle, administratrix, one share.

" 'Peter J. Dunn's estate, Ella C. Donnell, executrix, one share.

" 'Being forty in all. That the above named William Bell and W. B. Kennedy are residents of Canada and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll, No. 39, was one of the five shares belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as hereinafter mentioned. That Myron A. Spencer and J. Fred Woltz above named and Peter J. Dunn's estate are insolvent and nothing can be made from them. That the other named, including John Brokamp, are liable for the debts of the said partnership and the costs of this case, in proportion to the number of shares held by each respectively, but the right to contribution against said Myron A. Spencer and J. Fred Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, were surrendered, and the said shares were entered on the books of the bank as owned by the bank and so reported to the United States Govern-

ment, and the bank through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss and all this was done with the knowledge and acquiesence of the board of directors of said bank.'

"The court found the indebtedness to different persons in detail and then found that there are only twenty-three solvent share holders and charges them including said bank with the payment of the whole indebtedness and adjudges that in case of the subsequent insolvency of any of said shareholders before payment that the deficiency thus caused shall be made up by the remaining solvent shareholders. The decree against the bank is for over $17,000. The plaintiff having died, his executrix carried on the litigation.

"A motion for a new trial was overruled and bill of exceptions taken by the bank. Proper and full exceptions were saved throughout.

"A petition in error was filed in this court by the bank seeking to reverse the judgment of the circuit court.

"BURKET, C. J.

"The Merchants National Bank, of Cincinnati, is a corporation organized under the national banking laws of the United States, and the Elsmere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate and such transfers were intended to make the transferee a partner in the syndicate instead of the transferor, without a dissolution of the partnership.

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business.

"The bank in accepting said transfer evidently regarded it as a collateral but it so treated the shares and so transacted the business as to said shares that the circuit court found that the bank became the owner of the shares and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after all its property had been consumed in paying said debts a large debt still remained.

"The restrictions contained in our banking laws are for the purpose of securing the solvency and stability of the banks and the statutes should be so construed and the law administered as to reasonably bring about that end. The wealth and prosperity of the people depend to a large extent upon the soundness of the banks and the safety of the currency. The purpose of the government is to foster and encourage sound banking and preserve a safe currency; and it therefore allows national banks to collect claims due

them, even though a statute or a rule of law or equity may have been infringed in the incurring of the debt. The punishment for such infringement must come from the federal authorities in a proceeding instituted for that purpose, and not by a denial of the courts of the right of collection as a punishment.

"It is largely for the purpose of maintaining the solvency of banks that a national bank is allowed to collect loans secured by mortgage in violation of Section 5137, U. S. Revised Statutes; *National Bank* v. *Matthews*, 98 U. S., 621; *National Bank* v. *Whitney*, 103 U. S., 99.

"It is to the same end that the solvent shareholders in a national bank can not be compelled to stand good for the individual liability of the insolvent ones, and that the loss caused by such insolvency must be borne by the creditors of the bank. *U. S.* v. *Knox*, 102 U. S., 422; Section 5151, U. S. Revised Statutes.

"Hence it is that while banks are hedged about with restrictive laws as to making loans and discounts so as to incur no bad debts, the most liberal provisions are made for securing debts already incurred, by the taking of such collateral as may seem best in the judgment of the officers of the bank. Such collateral may become the property of the bank, in course of enforcing the security. And while a national bank can not lawfully purchase and hold shares in a corporation as an investment, *California Bank* v. *Kennedy*, 167 U. S., 362, it may accept the stock of a corporation as collateral security for a loan and may thereafter in realizing upon the collateral, become the owner thereof, and liable for individual liability the same as any other stockholder (*National Bank* v. *Case*, 99 U. S., 628).

This case seems to have been overruled in *Scott* v. *Deweese*, 181 U. S., 217, where the court say at the close of the opinion:

"'Whether a national bank may not be deemed a shareholder within the meaning of Section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided and upon which in this case, no opinion need be expressed.'

"But conceding that a national bank may take shares in another bank as collateral security for a new loan or to secure the payment of an old one and that it may become the owner of such shares in attempting to realize on such collateral and that it may thereafter be liable to creditors on its individual liability as such shareholder yet that falls far short of holding a national bank liable as a partner in a partnership, and liable as such partner for, not only its own share of the debts of the firm but also the debts of its co-partners. The individual liability of a holder of shares in a national bank is in its nature several and not joint (*U. S.* v. *Knox*, 102 U. S., 422); while the liability of a partner for partnership debts is as to creditors usually held to be joint, but some cases hold it to be joint and several.

"The individual liability is an inseparable incident to national bank shares, for which the lawful holder is liable, but this liability is his own debt and attaches to specific several articles of his property—the share of stock—and is, therefore, limited and can not exceed the face value of the stock. But in the case of shares in a partnership, the liability of a partner is not for a specific amount adhering to his share as an incident and limited to a certain amount, but the

only limitation is the whole indebtedness of the firm and which in many cases would far exceed the entire resources of the bank, and drive it into insolvency. The purpose of allowing a national bank to take collateral security is to enhance its solvency, and not to permit it to enter wild speculations as a partner under the pretext of enforcing its rights as a pledgee or owner.

"'It is settled that the United States Statutes relative to national banks constitute the measure of the authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S., 67, 73; *California Bank* v. *Kennedy*, 167 U. S., 362, 366.'

"To become a member of a partnership in any manner or for any purpose, is not incidental to carrying on the business for which national banks are established and is certainly not expressly granted. The power, therefore, does not exist. The liabilities for which a national bank must respond, are such only as are created or incurred by its officers, acting in the capacity of officers of the bank alone, and not in connection with other trustees or officers of other companies. Were it otherwise the other trustees or officers, might outnumber the officers of the bank, and impose burdens on the bank which would ruin it; and thus the bank would be controlled not by its officers, but, by outsiders. The officers of a bank can not delegate their power to others. It is, therefore, clear that a national bank can not be a partner in a co-partnership, and can not incur a partnership liability.

"The same has been held as to corporations in this state (*Gearinck* v. *Alcott*, 66 Ohio St., 94). The first subdivision of the syllabus was omitted by mistake of printer, but is found in the head note and also in the index and is as follows: 'A corporation can not be a member of a partnership.'

"But it is contended that while a national bank can not become a partner generally that where it becomes the owner of a share in an existing partnership, like this Elsmere Syndicate, that in effect it becomes a partner and liable as such. That begs the question. If it had the power to become a partner, such might be the case; but not having the power, it can not go beyond its powers and can not by any act make itself a partner and can not incur a partnership liability.

"Cases are cited in which a bank has taken some specific piece of property, as a ship for instance, to secure a debt, and had been held liable for the expenses of managing or converting such property, but such expenses were incurred by the bank and were its individual debt and not the debt of a partnership. With such cases we fully agree, but in those cases it does not appear that the bank was hampered by a lack of power, as is the case under our national banking act. *Royal Bank of India's Case*, L. R., 4 Ch. App. Cas., 252.

"Not having the power to enter into such partnership it is well settled that the bank may plead such want of power to defeat an attempt to hold it as such partner. *California Bank* v. *Kennedy*, 167 U. S., 362.

"It is further agreed that the bank partly realized on some of these shares and held itself

out as a partner, and it is therefore estopped from now claiming that it was not such partner.

"That the realizing on stock by receiving dividends does not create an estoppel, was held in the above cited case of *Scott* v. *Deweese*, 181 U. S., 217; the court near the close of the opinion hold:

"'Of the powers of a national bank under the statutes providing for their creation, every one must take notice.'

"Every one is, therefore, chargeable with knowledge that a national bank can not be a partner and, therefore, this bank could not hold itself out as being that, which in law it could not be and its acts in that behalf could deceive no one, as no one could in law rely upon such acts. One can not rely upon a representation which he knows to be false or impossible.

"The bank having become the owner of these nine shares and not having the power to become a partner, it became in legal effect a part owner of the property of the syndicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving and disposing of the property. The bank is thus liable for nine-fortieth parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness.

"The record does not clearly furnish the data from which this amount can be ascertained by this court and therefore the judgment against the plaintiff in error will be reversed and the cause remanded to the circuit court with instructions

to ascertain what nine-fortieths parts of said debts and expenses amount to and render judgment against said bank for that sum, and also for nine-fortieths parts of the costs.

"Judgment reversed and cause remanded.

"SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur."

The circuit court having complied with the mandate of the Ohio Supreme Court as expressed therein, the Merchants National Bank, the plaintiff in error here, then prosecuted error to the Supreme Court of Ohio and also from that court to this court.

ARGUMENT.

We contend there is no federal question involved in this proceeding and that, therefore, the petition in error should be dismissed and remanded to the state court. Plaintiff in error alleges three assignments of error, but they are all embraced in the single question: Was the action of the Supreme Court of Ohio in violation of Sections 5136 and 5137 of the Revised Statutes of the United States? This question is to be determined only on the original pleadings and the judgments of the respective state courts. And all the evidence in the printed record from pages 20 to 37, inclusive, and Exhibits on pages 49 to 57 are wholly irrelevant, immaterial and should and ought to be expunged from the record.

Wehrmann, the plaintiff in the original petition in the court of common pleas (page 18 of the Record), averred insolvency of the syndicate and the shareholders of the syndicate were liable as partners and that at the time of contracting the debts of the syndicate, the Merchants

National Bank was the owner of nine shares of the total forty shares, which nine shares it had acquired before the insolvency of the syndicate from one McFarlan to secure and in payment of a debt owing the bank by McFarlan.

The answer of the bank denied that any time it became the owner of any shares in the syndicate either by purchase or as a security for the debt of any person, no finding of the original court of common pleas is in the record, but the finding and judgment of the circuit court appears on page 37 of the record, who tried the case on appeal, was in substance that the syndicate was a partnership and its members liable as such and the Merchants National Bank liable for nine-fortieths of the indebtedness. This judgment the Supreme Court of Ohio reviewed and sustained the contention of the bank that it could not be held as a partner, but having acquired the shares of one of the members to secure and in payment of a debt, the bank thereby became the owner of an undivided nine-fortieths parts of the assets of the syndicate, and having participated in creating the debts of the syndicate to realize on its security it was, therefore, liable for nine-fortieths of the syndicate debts, and remanded the cause to the Circuit Court of Hamilton County, Ohio, with instructions to "proceed and ascertain the amount of debts and expenses of said Elsmere Syndicate" remaining unpaid after the application of the assets of said syndicate to the payment of its debts, including interest, and then render judgment against said plaintiff in error for nine-fortieths parts of said debts and interest remaining so unpaid and also render judgment against said plaintiff in error for nine-fortieths part of the costs (see judgment Supreme Court Record, page 48). The opinion upon which

this judgment is based, plaintiff in error for some unexplained reason failed to incorporate in the record at bar, but is found in 69 Ohio State Reports, page 160, a copy of which he have incorporated in this brief.

The circuit court carried out the instructions of the Ohio Supreme Court, as appears on pages 57 to 63 of the Record, and its judgment was affirmed by the Ohio Supreme Court, without report, as appears by the latter's journal entry, page 70 of the Record. If there ever was a federal question involved in the case, the Supreme Court on plaintiff in error's petition eliminated it from the record and held in express terms that a national bank could not be a member of a partnership and, therefore, not liable as such, but having become the owner of the nine-fortieths of the real estate and personalty of the syndicate through its debtor, McFarlan, and afterwards, in order to realize its debt, created an indebtedness in connection with its co-tenants, in managing, handling, holding, improving and disposing of the property it had thus acquired, it was liable for its proportion of that indebtedness it had created. For the Supreme Court of Ohio to have held otherwise would be to have said that a national bank was not liable in the state courts for its ordinary contract debts, because we contend that such an indebtedness is not prohibited by any federal statute.

Wehrmann's original petition (Record, page 16) set out the facts but characterized all the members as partners (including the bank), but the object of the action was the equitable winding up of the syndicate, to convert its assets into money and pay its debts.

As to the creditors it was immaterial whether the members were owners as partners, tenants in common or other-

wise. So whatever the character of the ownership of the respective members, they could not escape liability of their own creation. All the material allegations of Wehrmann's original petition were sustained by the Supreme Court save and except that the bank was an undivided owner in severalty and liable for nine-fortieths of the debts they had created and participated in creating instead of being liable as a partner for nine-twenty-thirds. And we undertake to say that this court will not concern itself as to the amount of the indebtedness or whether the indebtedness was created before or after the bank acquired its ownership through its debtor, McFarlan. All these questions are settled by the Supreme Court of Ohio and the only question here, is such finding in violation of the United States Banking Act as expressed in R. S., 5136 and 5137, and indicated in the entry of certification, page 71 of the Record?

We concede that if the bank had acquired the ownership in the syndicate property otherwise than by taking it in payment of or as security for a previously contracted valid indebtedness, the transaction would have been *ultra vires* and void and could not be confirmed or ratified.

Earl v. *Carson*, 188 U. S., p. 52.

But we do not contend that if the bank, in order to secure and in payment of a valid debt due it, acquired ownership either of personal or real property, creates an indebedness in handling or putting the same in saleable condition or in placing it on the market to realize its original debt, it is not an *ultra vires* act, that it can escape liability for its own acts. And an action can be main-

tained in the state courts to recover such indebtedness under the act of August 13, 1888. The principle is not new or novel.

Roebling v. *First National Bank of Richmond*, 30 Fed. Rep., page 744.
Cockrill v. *Abeles*, 86 Fed. Rep., 505.
Cooper v. *Hill*, 94 Fed. Rep., 94.
Libby v. *Union Nat. Bank*, 99 Ill., 622.
Upton v. *South Reading National Bank*, 120 Mass., 153.
Reynolds v. *Crawfordsville First National Bank*, 112 U. S., 405.
First National Bank v. *Exchange Bank*, 92 U. S., 122.

A very wide latitude is given to a bank to take property to prevent the loss of a debt and to use and improve it temporarily until an advantageous disposition can be made of it (5 Cyc. L. & P., p. 591).

Judge Sanborn in the Cockrill case, 86 Fed. Rep., 505, states the principle clearly that—

> "It will be admitted, of course, that a national bank has no power to purchase real estate except such as is necessary for the convenient transaction of its business or such as it may be compelled to take as security for or in satisfaction of debts previously contracted (Rev. St., 5137). We think, however, that when a national bank, as in the present case, has lawfully acquired an undivided interest in real property in satisfaction of a debt, it may lawfully purchase other undivided interests in the property and discharge liens or encumbrances thereon providing such action is necessary to enable it to manage or dispose of the property to better advantage.

> "The power conferred by the statute to acquire real estate in satisfaction of a debt is not exhausted by acquiring simply an undivided interest in such property, but it extends to the acquisition of all interests in the property, if an undivided control and ownership thereof is deemed necessary for the ultimate security of the bank.
>
> "In many cases the right accorded to national banks to take real estate for debts previously contracted would prove a barren right if they were limited to such an interest as was first acquired and were denied the right to purchase other outstanding titles and interests."

In the case at bar the Merchants National Bank lawfully acquired its undivided interest in the syndicate property and the presumption necessarily attached what the bank did in creating the indebtedness which it did, that it was done in a prudent manner and was necessary to properly put the property thus acquired on the market in a saleable condition to realize on their original loan to McFarlan.

If as was stated in the Roebling case the bank had the lawful right to lend its money to McFarlan as authorized by its charter, this carried with it the power to collect and as an incident to such power the right to secure and save the debt. And we contend that when it affirmatively appears in the record that the Merchants Bank loaned the money to McFarlan in due course that they acquired an undivided ownership in the syndicate property to save and collect the debt, the manner, means and method they adopted are presumed to be in accordance with their authority to collect and are not required to

appear affirmatively in the record in order to sustain a judgment for an indebtedness contracted to carry out the purpose to realize on the security to pay the original debt.

The original pleadings show that at the time of the acquisition of McFarlan interests to secure its debt the syndicate was the owner of the real estate or leasehold; that it purchased none thereafter and that *at the time of making said loans and contracting said debts* the Merchants National Bank was the owner of nine-fortieths of its property; that the loans made were necessary to save the shareholders from loss. The claim of Wehrmann was that at the time the Merchants Bank acquired its interest in the syndicate the indebtedness was created in preserving and putting the property it then owned in a marketable condition and in disposing of it. There is no averment in either the petition or the bank's answer that at the time, or thereafter, there was any buying or speculation in real estate. They were at that time doing their utmost to realize on their holdings.

And this was the finding of the Circuit and Supreme Courts. Whether what the syndicate members and the bank did in order to realize on their holdings was done in a prudent manner or whether they were mistaken in their judgment, or acted wisely or otherwise in creating the indebtedness to thus realize on their property is a matter we do not think this court is called upon to consider. Therefore, the Converse case cited by plaintiff in error, it seems, can not apply to the case at bar.

In conclusion, we contend that when the Supreme Court on the petition of the plaintiff in error held that the bank could not be held liable as a partner, but was liable as an owner in severalty, it eliminated any federal question

from the case as far as the plaintiff in error is concerned, and there being no federal question involved in the judgment appealed from, this case should be dismissed and remanded to the Ohio Supreme Court.

Respectfully submitted,

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